respect of the whole sum remaining due, for instance, after the expiry of 12 years from the date on which the judgment became enforceable and in the absence of any consideration disentitling the judgment creditor to leave, the parties should be left to themselves to work out the proper amount due in respect of which execution could be levied.

We are consequently unable to see how on the submission made to him and, presumably considered by him, the judge could have judicially exercised his discretion in the circumstances of the case to dismiss the application for leave. We therefore allow the appeal with costs here and in the court below.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Lovelace & Hastings.*

YOONG LEOK KEE CORPORATION SDN. BHD. v. CHIN THONG THAI

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 13 & February 16, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 90 of 1980]

Torts — Negligence — Damages — Duty to mitigate damages — Injured person leaving hospital against medical advice — Loss of future earnings.

Damages — Duty to mitigate — Injured person leaving hospital against medical advice.

Practice and Procedure — Amendment to statement of claim after close of case for both sides — Discretion of trial judge — R.H.C. 1980, O. 20 r. 5.

The respondent was awarded damages for injuries sustained by him in the course of loading logs on to a conveyor belt upon a finding of negligence on the part of the employers. A sum of $42,000 was awarded for future loss of earnings. The appellant appealed on two grounds alleging that the learned trial judge erred (a) in allowing an amendment to be made to the statement of claim after the respondent had closed his case and after the appellant had closed his case and made the submission and (b) in his award of future loss of earnings to the respondent against the weight of the medical reports and in particular the learned judge's failure to consider the duty placed upon the respondent to mitigate the damage. It appeared on the facts that the respondent left the hospital against medical advice.

Held: (1) the learned judge had properly exercised his discretion under Order 20 rule 5 of the Rules of the High Court, 1980 when he allowed the amendment to the statement of claim in the interest of justice;

(2) it was erroneous to assess the loss of future earnings without considering the duty of the respondent to mitigate the damage. The error was one of principle and it was therefore open for the appellate court to interfere;

(3) in the circumstances the award for loss of future earnings should be reduced to $21,000.

Case referred to:-

(1) *British Westinghouse Electric and Manufacturing Company Limited* v. *Underground Electric Railways of London Limited* [1912] A.C. 673, 689.

HIGH COURT.

Dato Wong Cheng Chow for the plaintiff.

David Alfred for the respondent.

Cur. Adv. Vult.

Ajaib Singh J.: The plaintiff sued the defendants for damages arising out of an accident in a sawmill. In his statement of claim the plaintiff alleged that he was an employee of the defendants and that in the course of his work he was following a cart from which logs were thrown on the conveyor belt. He was following the cart when a log so thrown caught his right foot when the cart moved and he was dragged for five or six feet whereby he suffered severe injuries to his right foot. He alleged that the accident was caused as a result of the negligence of the defendants for not taking reasonable care to provide or maintain a safe and proper system of work and/or effective supervision.

In their statement of defence the defendants denied that the injury was caused by their negligence and stated that it was caused solely or contributed to by the plaintiff's own negligence.

In his evidence the plaintiff said that on the day in question he was working with two others in the sawmill. He was on a cart loaded with logs and was working with another person. The third person was nearer the electric saw and this person controlled the movement of the cart as well as the electric saw. The plaintiff said that while he was working on the cart that day the electric saw and the cart stopped. He noticed that a piece of cut wood was not in its alignment in the cart and as he was putting the wood in its proper place the person who was controlling the electric saw and the cart suddenly switched on the movement of the saw and the cart and as a result he lost his balance and his leg fell into a gap and he was dragged a few feet. He said that there were no safety rails on which he could hold on. After this accident the sawmill did not use this cart any more. It was bought by the defendants as a second-hand cart and had been in use for about two weeks before the accident. Someone in the factory had briefed them on the use of the cart but there were no proper instructions. He said that when he was putting the plank in its proper place the person controlling the machine was not facing him but was facing the other way towards the electric saw.

In cross-examination the plaintiff said that the cart was propelled by an electric motor and was controlled by the person who was controlling the electric saw. The cart moved backwards and forwards during the work and the mode of operation in a newer cart was also the same except that in the newer cart the man controlling the cart would face the man who worked on the car. He reiterated that there was no place on the cart for him to catch hold of when he lost his balance at the sudden movement of the cart. He was using both his hands to place the log in its proper place. He denied that the accident occurred because of his own negligence.

The second witness for the plaintiff (PW2) more or less corroborated the evidence of the plaintiff. He himself was on the ground while the plaintiff was on the cart and the plaintiff tried to adjust two timber logs which were out of alignment. The cart was then stationary and when the plaintiff was adjusting the logs the cart moved and the plaintiff fell off. PW2 then shouted out to the third man Cheong Fatt who was operating the machinery but by that time the plaintiff had moved 4—5 feet. He said that the person who operated the machinery was facing the saw

and not the cart. There were no safety rails on the cart on which a person working on the cart could hold on.

The evidence on behalf of the defendants was brief. They said that the plaintiff was working on a contract basis and they were therefore not liable to the plaintiff. Not much was said by the defence to refute the allegations of the plaintiff that he was injured because of the negligence of the defendants in not providing a safe system of work. There was however no averment in the statement of defence that the plaintiff was an independent contractor.

At the conclusion of the hearing Dato' Wong Seng Chow for the plaintiff applied for an amendment to paragraph 5 of the statement of claim in the light of the evidence adduced on behalf of the plaintiff. In this paragraph 5 the plaintiff had averred that he was following the cart from which logs were thrown onto the conveyor belt when a log so thrown caught his foot when the cart was moved and he was dragged for five or six feet by the machine. The evidence adduced in court however was to the effect that the plaintiff was on the cart itself when the accident occurred.

Mr. David Alfred opposed the application and submitted that it was too late now to allow any amendment. I agreed that as a general rule amendments are not allowed after the conclusion of a trial but I was of the view that a suitable amendment may be allowed even after the trial if it was in the interest of justice. The application for the amendment really ought to have been made at the close of the case for the plaintiff. However I was of the view that this was a fit and proper case to allow the amendment in the interest of justice. Accordingly I allowed the application to amend paragraph 5 of the statement of claim. In the event I held the defendants liable to the extent of 80% and held that the plaintiff was also to be blamed for the accident to the extent of 20%. The defendants owed a duty to the plaintiff to provide a safe system of work on the cart and at least to provide railings on which the workman could have held on if he became unbalanced whilst working on the cart. This the defendants had failed to do. On the other hand the plaintiff was to be blamed to some extent for not taking care of himself when he was adjusting the logs on the cart.

On a 100% liability I awarded general damages for the injuries, pain and suffering and loss of amenities a sum of $28,000, for loss of earnings from the date of the accident I awarded a sum of $200 for 59 months making a total of $11,800, and for loss of future earnings at $300 per month at a purchase of 18 years a sum of $42,000.

From the above judgment the defendant appealed to the Federal Court.

FEDERAL COURT.

David Alfred for the appellant.

S.C. Wong for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): The respondent Chin Thong Thai, an employee of the appellant, Yoong Leok Kee Corporation Sdn. Bhd. sawmiller, was awarded damages for injuries sustained by him in the course of loading logs on to a conveyor belt upon a finding of negligence on the part of the employers by the High Court, Seremban, out of which a sum of $42,000 was allowed for future loss of earnings.

The appeal is proceeded on two grounds, namely, that the learned judge erred both in law and in fact (a) in allowing the amendment to be made to the statement of claim after the respondent had closed his case and after the appellant had also closed his case and made the submission, and (b) in his award of future loss of earnings to the respondent against the weight of the medical reports, in particular, the learned judge's failure to consider the duty placed upon the respondent to mitigate the damage.

On the question of amendment we form the view that the learned judge had properly exercised his discretion under Order 20 rule 5 of the Rules of the High Court, 1980, when he allowed the amendment to the statement of claim to be effected stating that it was a fit and proper case to allow the amendment to be made in the interest of justice. The granting of such amendment did not in our view, prejudice the appellant in his defence as the opportunity was given by the learned judge to the appellant to recall any of the witnesses who had already testified.

As for the second ground it is the appellant's contention that the learned judge had failed to consider the question of mitigation of damages, a factor he ought to have taken into account in assessing future loss of earnings.

To determine this question it is necessary to state briefly the relevant facts. The respondent was 28 years old at the date of the judgment. Damages in the sum of $11,800 at $200 p.m. was awarded for loss of earnings from the date of the accident to the end of the trial for 59 months. The learned judge also awarded a sum of $42,000 for future loss of earnings at $300 p.m., a purchase of 18 years on account of the injuries sustained by him.

The respondent suffered severe injuries to his right foot and was admitted to the surgical unit on April 29, 1975. There was deep laceration over dorso medial aspect of right foot exposing muscles, tendons at lower end of tibia. There were other lacerations which exposed the calf muscles. X-rays showed compound fracture of right calcaneum with dislocation of the talo-navicular joint. It is stated in the medical report issued by Dr. Harpal Singh on June 19, 1976 that the respondent developed ischaemic changes in his right foot and he went home against medical advice.

Another report was issued by Consultant Surgeon Mr. G.S. Hiremath attached to Kelinik O-Holohan, Seremban to the effect that there was a complete loss of forefoot with grotesque-looking stump which failed to reach the ground when the respondent attempted to stand on both feet. The plantar region of his right foot was covered with ragged thick sensitive scar. There was virtually no movement in his right ankle joint. The consultant expressed the view that judging

from the recorded medical notes to the effect that the respondent developed ischaemic changes in his right foot it was highly likely that such changes occurred as a result of arrest of the blood flow to the forefoot due to sudden occlusion of the artery supplying blood or total severance of the vessel. Gangrene ensued following arrest of blood supply resulting in death of the forefoot which has sequestrated from the limb leaving behind an uneven grotesque stump replacing normal foot. It was his view that functionally the irregular stump served no purpose. A well-planned amputation of his right leg followed by the fitting of an artificial leg would enable him to lead a normal healthy life.

It is the appellant's contention that if the respondent had not left the hospital against medical advice and if he had the leg amputated and fitted with an artificial leg there would then be no future loss. The respondent, however, contended that even if the respondent had his leg amputated it is doubtful he could get $150 p.m. and assuming he could, the loss would still be around $450 p.m. and given 27 years' purchase he should be awarded a sum of $79,072.38 future loss of earnings.

The law is clear in that as enunciated by Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London, Limited* (House of Lords)[1]

"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."

Thus the onus falls upon the respondent to take all reasonable steps to mitigate the amount of damage. It is evident that the respondent acted unreasonably when he left the hospital against medical advice. If he had remained in the hospital to continue with the treatment even if it should become necessary to have the leg amputated, it was clear that he would be able to lead a normal healthy life.

With respect the learned judge did not state whether he gave any, if at all, consideration to this factor in his assessment of damages for future loss of earnings. There was no definite evidence that the respondent would lose $300 p.m. On the contrary there was evidence that the respondent was only earning about $200 p.m. at the date of the accident. Even assuming his income would increase under the present day market the amount of damages for his future loss of earnings must nevertheless be viewed in the light of the fact that if he had submitted to proper medical treatment (fitted with artificial leg, if necessary) he would be able to lead a normal life and with his level of education he could still work and earn some income.

We form the view that it was erroneous to assess the loss of future earnings without considering this duty of the respondent to mitigate the damage. The error is one of principle and it is therefore open for this court to interfere.

There is no reason to doubt that the respondent would suffer loss in his future earnings, but for reasons stated above his future loss, even if it is assessed on the basis of an enhanced monthly earnings, should not in the absence of definite evidence be more than his earnings at the date of the accident.

We are of the view that on a sum of $150 p.m. given the number of years' purchase decided by the learned judge, the proper award for loss of future earnings should be a sum of $21,000. We therefore allow this appeal and vary the award accordingly.

Appeal allowed.

Solicitors: *David Alfred & Co.; Shearn Delamore & Co.*

KANAGASABAI SATKURU v. UNITED MALAYAN BANKING CORPORATION BHD.

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) February 16, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 45 of 1980]

Practice and Procedure — Claim on overdraft account — Shares deposited as security — Shares sold to settle account — Whether bank was bailee or pawnee of shares — Issue not raised in pleadings.

Banking — Overdraft account — Shares deposited as security — Shares sold to settle account — Whether bank was bailee or pawnee of shares.

Contract — Shares deposited with bank to secure overdraft — Whether bank bailee or pawnee of shares — Contracts Act, 1950, ss. 125-129.

In this case the appellant bought and sold shares using overdraft facilities on the security of the shares deposited with the respondent bank. The stock market crashed and the respondent demanded payment of the overdraft. Eventually the respondent sold the shares for $46,945.20 leaving a balance of $13,174.59 on the overdraft account. The High Court gave judgment for this sum against the appellant. The appellant appealed and on the appeal it was argued *inter alia* that the respondent bank was a bailee or pawnee of the shares and was under a duty to ensure that the sale of shares was a provident one.

Held, dismissing the appeal: the question raised by the appellant was not alleged in the pleadings. The learned trial judge properly decided the case on the issues disclosed by the pleadings.

Cases referred to:-

(1) *Haji Mohamed Dom* v. *Sakiman* [1956] M.L.J. 45.

(2) *Selangor United Rubber Estates Ltd.* v. *Cradock & Ors.* [1965] Ch. 896.

FEDERAL COURT.

G. Sri Ram for the appellant.

Jean Oliveiro (Mrs.) for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): The High Court at Seremban entered judgment in the sum of $13,174.59 against the appellant for the balance on the overdraft account.

The facts reveal that the appellant bought and sold shares using overdraft facilities on the security of the shares deposited with the respondent bank. Things did not fare well for the appellant when the